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CPLR 308(5): Defendant's Attempt To Evade Service of Process by Deception Held Ineffective

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object of the action when the summons was served, the Supreme Court, Tompkins County, entered a default judgment after an inquest, the defendant having failed to appear.[42] On appeal, the Appellate Division, Second Department, reversed the lower court's order and vacated the judgment, holding that the defect in the notice was jurisdictional.[43] The dissent reasoned that since a notice was given pursuant to CPLR 305(b) and the defendant was advised of the assertion of a serious claim, the court had power to enter the default judgment.[44]

The *Arden* holding implies that a defective CPLR 305(b) notice is equivalent to no notice at all, the defect rendering a court powerless to enter a default judgment. This decision requires one who seeks the benefits of CPLR 305(b) to comply fully with its provisions, thereby affording the fullest protection to the absent party. The practitioner can avoid this jurisdictional pitfall by including a statement of the object of the action when serving a 305(b) notice.

CPLR 308(5): Defendant's attempt to evade service of process by deception held ineffective.

CPLR 308(5) empowers a court to devise extraordinary methods of service of process when the regular methods are impracticable.[45] Such impracticability may result when a defendant intentionally evades the process server. In *Kenworthy v. Van Zandt*,[46] the defendant, by false assurances of his availability, induced the plaintiff's attorney to delay service of process for three days. In the interim, the defendant vacated his New York apartment and established a new domicile in Tennessee. Upon discovering the ruse, the plaintiff's attorney effected service by delivering the summons and complaint to the superintendent of the apartment building where the defendant had resided and by mailing a

> [T]he summons may contain or have attached thereto a notice stating the object of the action and the relief sought, and, in an action for a sum certain or for a sum which can by computation be made certain, the sum of money for which judgment will be taken in case of default.

Note that the statute appears to require a statement of the object of the action in cases involving liquidated damages as well as in other actions.

[42] The clerk may enter a default judgment under CPLR 3215 only when the summons and notice were for a liquidated claim. When unliquidated damages are sought, a plaintiff who has served an object notice may obtain a default judgment by applying to the court and obtaining an inquest. *See* 1 WK&M ¶ 305.12.

[43] 40 App. Div. 2d at 895, 337 N.Y.S.2d at 671, *citing* McDermott v. Hoenig, 32 App. Div. 2d 838, 302 N.Y.S.2d 280 (2d Dep't 1968) (mem.).

[44] 40 App. Div. 2d at 895, 337 N.Y.S.2d at 671.

[45] The court's discretion under CPLR 308(5) is limited only by the requirements of due process. The method of service devised must be reasonably calculated to give the defendant notice of the action and an opportunity to be heard. Milliken v. Meyer, 311 U.S. 457 (1940).

[46] 71 Misc. 2d 950, 337 N.Y.S.2d 481 (N.Y.C. Civ. Ct. N.Y. County 1972).

copy to the defendant at that address. The defendant's attorney moved to dismiss the complaint on the ground of improper service. The New York City Civil Court, New York County, denied the motion and expressed its abhorrence for the artful devices employed to frustrate service of process. Relying on *Dobkin v. Chapman*,[47] the court concluded that the plaintiff's method of service complied with due process, but ordered additional service upon the defendant's attorneys, service to be valid *nunc pro tunc* from the date of the initial service.[48]

Clearly, a defendant should not be allowed to evade service of process by the deceptive means employed in *Kenworthy*. The court's holding comports with New York decisions denying effectiveness to deceptive avoidance of process.[49]

CPLR 327: Denial of permission to arbitrate on the ground of forum non conveniens.

In *Hubbell v. Insurance Co. of North America*,[50] the petitioner commenced a proceeding under CPLR 7502(a) for permission to submit to arbitration a controversy between his four infant children and the respondent insurance company, which was doing business in Nassau County.[51] The dispute arose out of an automobile collision with an uninsured Pennsylvania motorist in Pennsylvania. Previously New York residents, the petitioner and his family had moved to Pennsylvania prior to the accident.

The Supreme Court, Nassau County, denied the petitioner's application under the doctrine of *forum non conveniens*, and the Appellate Division, Second Department, unanimously affirmed. Invoking *Silver v. Great American Insurance Co.*,[52] the Second Department

47 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968). The Court of Appeals in *Dobkin* established a flexible due process requirement. Due process, the Court stated, may, in certain circumstances, be satisfied even where there is little probability that the method of service will give the defendant actual notice of the litigation. "Due process does not require that defendants derive any advantage from the sedulous avoidance of . . . measures [intended to inform them of litigation]." *Id.* at 504, 236 N.E.2d at 459, 289 N.Y.S.2d at 173.

48 71 Misc. 2d at 954, 337 N.Y.S.2d at 484-85. Service which does not comply with CPLR 308(1), (2), or (4) may be validated by a *nunc pro tunc* order under CPLR 308(5). *See* Totero v. World Tel. Corp., 41 Misc. 2d 594, 245 N.Y.S.2d 870 (Sup. Ct. N.Y. County 1963); 7B McKINNEY'S CPLR 308, commentary at 215 (1972).

49 *See* Cohen v. Arista Truck Renting Corp., 70 Misc. 2d 729, 335 N.Y.S.2d 30 (Sup. Ct. Nassau County 1972) (defendant in automobile accident case voluntarily gave plaintiff wrong address); Schenkman v. Schenkman, 206 Misc. 660, 136 N.Y.S.2d 405 (Sup. Ct. Kings County), *aff'd mem.*, 284 App. Div. 1068, 137 N.Y.S.2d 628 (2d Dep't 1954) (defendant in divorce action misrepresented his identity and returned process papers).

50 40 App. Div. 2d 696, 336 N.Y.S.2d 310 (2d Dep't 1972) (mem.).

51 Since the respondent was doing business in Nassau County, an application was properly brought there under CPLR 7502(e).

52 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972), *noted in* 46 ST. JOHN'S L. REV. 588 (1972).